No. 625

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEO PRYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	9

CITATIONS

Cases:

Blumenthal v. *United States*, 332 U.S. 539	7
Delli Paoli v. *United States*, 352 U.S. 232	7, 8

Statute:

26 U.S.C. 4742(a)	2

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OPINION BELOW

The opinion of the court of appeals (R. 49-58; Pet. App. 1-10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1960 (R. 59; Pet. App. 11). On November 25, 1960, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including January 2, 1961, and the petition was filed on January 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in admitting into evidence a post-arrest confession of a co-conspirator, even though the court repeatedly admonished the jury to consider the confession only as to the declarant, and not as to any other defendant.

2. Whether the evidence supports the conviction.

STATEMENT

Following a jury trial held in the United States District Court for the Eastern District of North Carolina, petitioner, together with four others,[1] was convicted of conspiring to transfer marihuana not pursuant to a written order form in violation of 26 U.S.C. 4742(a) (count 1) and of a substantive violation of that statute (count 4).[2] Petitioner was sentenced as a second offender to four years' imprisonment on count 1, that sentence to run concurrently with a twelve-year sentence imposed on count 4 (R. 46).

1. On July 16, 1959, narcotic agent Richard M. Patch, acting in an undercover capacity, contacted defendant Bryant at the Press Club, in Raleigh, North Carolina, and informed him that he wanted to

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[1] William Henry Bryant, Thomas Johnson, William Treadwell, and Bessie Lee Ward.

[2] The indictment contained four counts. Petitioner was not named in count two. He was named in count three, but the charge against him on this count was dismissed at the close of the government's case. (R. 16).

purchase five pounds of marihuana. Bryant told him he knew of a "man" nearby growing marihuana crops, but did not know if he would be willing to sell such a small amount. After agreeing on the price ($100 per pound) and after some further discussion as to the amount, Bryant said he would discuss it with "the man" (R. 3-5). On July 23, Bryant told the agent, "I have got you the connection and he has the stuff" (R. 5). The agent then went to a cafe owned by defendant Johnson. Johnson went to an adjacent house from which defendant Treadwell emerged and placed two pounds of marihuana in the agent's car. The agent then gave him $200 of government funds (R. 5-7). No written order form was given to Treadwell for the marihuana (R. 9-10).

On August 6, 1959, Agent Patch returned to the Press Club and talked with Bryant concerning another purchase of narcotics. Defendant Johnson was present at this time. Bryant said that he had not seen "the man" yet but would go see him (R. 11). Bryant then left and returned at about 1 p.m. and told the agent that he had seen "the man" and that the "stuff" would be ready at about 9 p.m. that night (R. 12). Delivery of five pounds of marihuana was made at about 9:20 p.m. that evening by defendants Ward and Bryant (R. 12-14). The agent paid Bryant $500 and Bryant gave him his telephone number for future calls (R. 14-16). No written order form was given to any of the defendants at the time of this transaction.

Agent Johnson, who had Bryant under surveillance on August 6, testified that, shortly after noon, Bryant

left the Press Club and proceeded to petitioner's farm some 6 miles from Raleigh (R. 21-22). The agent observed petitioner and Bryant in conversation for 6 or 7 minutes and then saw them enter the house. Shortly thereafter, Bryant left and drove back to the Press Club (R. 22). Agent Johnson further testified that about 8:30 p.m. that evening he observed a 1958 Chevrolet, license No. DT 350, driven by defendant Ward coming from the vicinity of petitioner's premises and proceeding to the Press Club (R. 22-23). Agent Melvin testified that, on the same night, he observed the Chevrolet enter petitioner's premises, that there were a man and woman in it, and that he thereafter followed the car back to Raleigh (R. 31-32).

On August 17, 1959, Agent Patch again contacted Bryant and arranged to purchase 25 pounds of marihuana. The next evening at about 9 p.m., they met at the Press Club (R. 16-17). Bryant told the agent that he had the stuff available, but refused to allow the agent to accompany him to obtain it (R. 17). When Bryant left to get the marihuana, Agent Patch arranged for his surveillance (R. 17). Bryant thereupon drove to petitioner's farm, entered the premises and returned shortly thereafter with a bag which he placed in the back seat of his automobile. Soon after, on his way back to Raleigh, his automobile was stopped and he was arrested. In the back seat of his car was found a bag containing about 25 pounds of marihuana (R. 24-25, 28-29, 32-34, 34-36).

Shortly after midnight, Agent Patch, accompanied by other enforcement officers, went to petitioner's

home. The agent identified himself as "Dick," [3] and stated that Bryant had told him to pay petitioner his share for the "pot" (marihuana) transferred that night (R. 18-19). Petitioner agreed and said the price was $1800. The agent then discussed the possibility of cutting Bryant out of future arrangements altogether. Petitioner said he would have to think about it. When the agent asked if petitioner could get him 50 pounds of marihuana, petitioner replied that he could have it for him the next morning, and said that he would consider the possibility of reducing the price to $75 a pound. The agent then paid petitioner $500 in government funds, and told him that he had the remainder owing for the transaction in his automobile. Petitioner accompanied the agent outside holding the $500. Just before they reached the automobile, the agent identified himself and placed petitioner under arrest (R. 19-20; see also the testimony of Agent Johnson, R. 25-27).

2. After Bryant's arrest, on the night of August 18, he told Agent Patch, that he had obtained the marihuana from petitioner (R. 18). This testimony was offered by the prosecutor only against Bryant; and the trial judge immediately admonished the jury that the conversation had with Bryant after his arrest "will be considered by you only as it relates to the defendant William Henry Bryant and will not be considered by you in relation to any other defendant in the case" (R. 18). Immediately after

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[3] At his original meeting with Bryant on July 16, Agent Patch had introduced himself as "Dick McAfee, from Baltimore" (R. 4).

this precautionary instruction, Agent Patch testified to further aspects of his conversation with Bryant on this occasion. The trial judge overruled defense counsel's motion to strike and again cautioned the jury that it could consider this evidence only as to defendant Bryant and not "against the defendant, Pryor, or any other defendant" (R. 18).

Subsequently, federal narcotic agent Irvin Greenfeld read to the jury the signed statement given by Bryant after his arrest on August 19 (R. 36-38). Immediately before and after the statement was read, the court made clear that it could only be considered by the jury as it related to defendant Bryant, stating, in part, that "[i]f a defendant, after his arrest, implicates other defendants in any statement or admissions which he may make it is not evidence against the co-defendants because as to those defendants it is merely hearsay evidence and is incompetent. So I again caution you that you will consider this statement just read to you only as it relates to the defendant William Henry Bryant and you will not consider it as evidence in any relation to any other defendant" (R. 38-39). Thereafter, in his charge to the jury, the trial judge stated (R. 40-41):

> During the course of the trial, the Government's witness Irvin I. Greenfeld, District Supervisor of the Federal Bureau of Narcotics, read to you an alleged statement of the defendant William Henry Bryant made after his arrest on or about August 18, 1959. This statement was admitted only as it relates to the defendant Bryant and the statement will be considered by you solely in connection with your determination

> of the guilt or innocence of the defendant Bryant. It is not to be considered as evidence in connection with your consideration of the guilt or inocence of any of the other defendants.
> * * *

There was no objection by counsel to the charge as given.

ARGUMENT

1. Petitioner claims that the admission into evidence of the Bryant confession, obtained from Bryant after his arrest and his part in the conspiracy had terminated, was fatally prejudicial. This contention, however, is fully controlled by this Court's decision in *Delli Paoli* v. *United States*, 352 U.S. 232, which rejected the very same contention raised by petitioner here. See also *Blumenthal* v. *United States*, 332 U.S. 539, 551-553, 559-560. As in *Delli Paoli*, the jury here was repeatedly instructed each time any reference was made during trial to the post-arrest confession of Bryant that it consider his statements only on his case and not as to "Pryor, or any other defendant" (R. 18; see R. 38-39). In addition, in his charge to the jury the trial judge plainly restricted the Bryant confession to the issue of Bryant's guilt or innocence stating once again that the jury could not consider it as to any of the other defendants (see the Statement, *supra*, pp. 6-7; R. 39-41). Petitioner never moved for a severance (though represented by counsel of his choice), never requested that the confession be edited to delete any reference to him, and never raised any objection to the trial court's charge.

This was not a case of a complex conspiratorial scheme involving a mass of evidence hard to segregate. Rather, the conspiracy proved was simple in character and scope, and easily understandable by the jury. Furthermore, particularly on the substantive charge of which petitioner was also convicted—transferring marihuana without receipt of an order form on August 19, 1959—the evidence was conclusive of petitioner's guilt, totally apart from the Bryant confession (see the Statement, *supra*, pp. 4-5).[4] What this Court said in *Delli Paoli* is equally applicable here (352 U.S. at 242):

> Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. * * *

Similarly, there is nothing in this case to suggest that the repeated admonitions of the trial judge were not heeded by the jury, and that it convicted petitioner on anything but evidence properly admissible as to him.

2. Petitioner's argument as to the sufficiency of the evidence (Pet. 4, 7-8) was reviewed and rejected by the court below (Pet. App. 7-9). The evidence summarized in the Statement, *supra*, reveals that the evidence was sufficient to convict petitioner on both the

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[4] Since petitioner was sentenced to twelve years on this substantive charge to run concurrently with the four years imposed on the conspiracy count, the former conviction is sufficient to support the judgment.

conspiracy and substantive counts, wholly apart from the Bryant confession. There is no reason for further review of this factual question by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari be denied.

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